

- (1) Whether the Administrative Law Judge correctly determined claimant's average weekly wage.

The respondent, at oral argument, requested Appeals Board review of the following issue:

- (2) Whether the relationship of the employer and worker existed on the date of the alleged accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidentiary record, hearing the arguments and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The Administrative Law Judge found that claimant was not employed in multiple employment on the date of his alleged accident. Accordingly, the Administrative Law Judge determined claimant's average weekly wage based on claimant's earnings on the date of accident while employed only by the respondent. For the reasons set forth below, the Appeals Board affirms the Administrative Law Judge's determination that the claimant's average weekly wage on the date of his accident, December 23, 1992, was in the amount of one hundred fifty-seven dollars and twenty cents (\$157.20).

Claimant takes the position that on the date of his accidental injury he was a part-time employee of the respondent and at the same time was a part-time employee of other employers performing the duties of a concrete finisher. Therefore, claimant argues that his average weekly wage should be determined in accordance with K.S.A. 1992 Supp. 44-511(b)(7) which provides:

“The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.”

Claimant argues that he was performing work as a concrete finisher on a part-time basis for two or more employers on the date of his accident and, thus, he was employed in multiple employment as contemplated by K.S.A. 1992 Supp. 44-511(b)(7). Conversely, respondent argues that claimant was not employed in multiple employment on the date of accident as contemplated by this statute, as he was employed by one employer, the respondent. Both parties cite the case of Wade v. Union Nat'l Bank, 10 Kan. App. 2d 645, 707 P.2d 1087 (1985), as supporting their respective positions on this issue. However, the Wade case involved an injured worker who was employed full time by one employer and part time by two other separate employers. The Court held that the statute authorized weekly wage aggregation for the worker who performs the same or very similar type of work on a part-time basis for each of two or more employers but does not include a full time wage earner who also “moonlights” on one or more part-time jobs. *Id.* Syl. ¶ 1.

Although, the evidence in this case established that the claimant had worked for various employers prior to the date of accident, the Appeals Board finds that on the date of accident he was only employed by one employer, the respondent. Accordingly, since

the claimant's accidental injury did not arise out of and in the course of multiple employment, his average weekly wage should be based only on his employment with the respondent.

(2) The Administrative Law Judge found the claimant was an employee of the respondent and not an independent contractor on the date of accident. The Appeals Board affirms this finding and adopts the Administrative Law Judge's reasoning and analysis as its own.

All other findings and orders of the Administrative Law Judge as set forth in his Award dated July 25, 1995, are affirmed by the Appeals Board and are incorporated and adopted in this Order by the Appeals Board as if specifically expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward dated July 25, 1995 should be, and hereby is, affirmed as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James N. Kinder, and against the respondent, Murray & Sons Construction Co., Inc., and its insurance carrier, Continental National America Group, for an accidental injury which occurred on December 23, 1992, and based on an average weekly wage of \$157.20.

Claimant is entitled to 11.14 weeks of temporary total disability compensation at the rate of \$104.81 per week, or \$1,167.58, followed by \$104.81 per week for 18.89 weeks in the sum of \$1,979.86, for a 10% permanent partial general disability of the leg, a scheduled injury, making a total award of \$3,147.44, all of which is due and payable in one lump sum, less any amounts previously paid.

Further award is made for payment of unauthorized medical in the amount of \$350.00.

Further award is made that claimant may be granted future medical treatment on application only.

Claimant's attorneys are granted a lien against the proceeds of this award for not more than 25%, pursuant to K.S.A. 44-536.

Reporters' fees are assessed as costs against the respondent and insurance carrier to be paid direct as follows:

Appino & Biggs Reporting Service	\$155.20
Correll Reporting Service	\$238.40

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, Kansas
 Gary R. Terrill, Overland Park, Kansas
 James R. Ward, Administrative Law Judge
 Philip S. Harness, Director